

Col 4 8 E 2
Summus Angliæ Seneschallus:

OR, A

SURVEY
OF THE
Lord High-Steward
OF
ENGLAND,

HIS

Office, Dignity, and Jurisdiction ;

Particularly the

Manner of arraigning a PEER

INDICTED OF

TREASON or FELONY.

In a **LETTER** to the **LORDS** in the
TOWER; with Resolutions to certain
QUERIES made by their Lordships,
relating to Traiterous and Seditious
Practices.

Written at their Lordships Request,
By **ED. S.** of the *Temple*, Esquire.

Funesta Securis, Regni Securitas.

L O N D O N,

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[Price one Shilling.]

FOR A
SURVEY

OF THE

LANDS

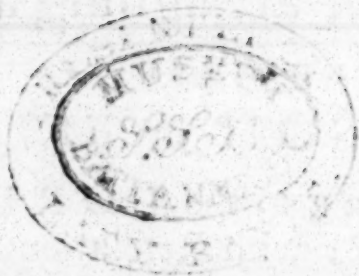
OF

THE

STATE

OF

NEW YORK



THE
NATURE of the OFFICE
OF A
Lord *High-Steward*, &c.

MY LORDS,

I SHALL not entertain your Lordships with any Preliminary Discourse, but presently let you into the main Building. As the *Royal Power* and *Sovereignty* of the *King of England* is a replete compacted Body, and impartible, even so the Attributes thereof are (as *Jurists* speak) so indivisible in themselves, naturally and intrinsically inherent in the *Crown*, that they cannot be made away, or so communicated to the Subject, as to divest *himself* of them, to the lessening *Sovereign Majesty*; yet by Trust, and delegate Power, the Execution may be

B transferred

transferred to others, to ease him of a troublesome Burthen.

Now among those several Ministers, or Officers of Law, that are by his *Most Excellent Majesty* substituted to ease him of Labour, (but not to deprive him of Power) the Lord *High-Steward of England* is one of the first Magnitude; the Nature of whose *Office* will the better be comprehended by your *Lordships*, if you vouchsafe to consider the Particulars following :

1. The Etymology of the Words, *Steward* and *Seneschallus*.

2. His *Lordship's Style*, and the *Antiquity of his Office*. —

3. How this great Office was *formerly holden*, and *how at this time*.

4. The *Extent of his Jurisdiction and Power*, and the *Rules he ought to judge by*.

5. The *Order and Manner of Arraigning*

ing a Peer of the Realm before this Great Officer.

For the Derivation of the words ^a *Steward* and *Seneschallus*, some say the first is derived of *Stewe*, *i. e.* a Place; and *Ward*, which signifieth a Keeper, Warden, or Governor.

Others say that it comes from ^b *Steda*, a *Saxon* word, which signifies a place also; and *Ward*, as it were the Keeper or Governor of that place: 'Tis a word diversly used in this Kingdom. In the first Acceptation, 'tis taken for the *Lord High-Steward*, out of which Magistracy, lower Officers have their rise; as *Seneschal de l'Hostel de Roy*, the *Steward of the King's most Honourable Household*, Anno 24 H. VIII. c. 13. whose Title was changed to that of ^c *Great Master*, Anno 32 H. VIII. c. 39. but this Statute was repealed by that of 1 Mar. 2 Parl. c. 4. and the Office of the Lord Steward revived.

^a *Cok. Litt.* 61. a.
Salop's Case, 48. b.

^b *Lib.* 9. *Le Counter de*
^c *Plomd. Com.* f. 152.

There is also a *Steward of the Marshal-
sea*, Anno 33 H. VIII. c. 12. and likewise a
^a *Steward of a Mannor*, whom *Fleta* fully
describes. To be short, this word is of so
great Diversity, that there is no Corporation
of any Account, or House of any Honour,
through the Realm, but it shall have an
Officer belonging to it of this Name.

But I proceed to the word *Seneschallus*:

^c *Seneschal* is a *French* word, the *Italians*
call it *Seniscalco*, dict. a *Schalk*, i. e. *Servus*
aut Officialis; & *Gesinde*, i. e. *familia*; but
here 'tis taken for the *High-Steward* of
England.

Some derive it of *Sein*, a House or Place,
and *Schale* an Officer; others say *Sen* is an
ancient word for Justice, so that most na-
turally it signifies *Officiarius Justitiæ*; and
this agreeth well with his Authority and
Duty, to proceed *secundum Leges & consue-
tudines Angliæ*.

^a *Lib. 2. c. 71.*

^c *Minshæus.*

In the next Place, I am to consider his *Lordship's Style*, which in *Latin* is *Seneschallus Angliæ*, and his *Court* is intituled, *Placita Coronæ coram Seneschallo Angliæ*; and when he sitteth by force of his Office, he sitteth under a Cloth of Estate, and such as direct themselves to him, say, *† Please your Grace, my Lord High-Steward of England.*

As to the *Antiquity of the Office*, 'tis very ancient, and was before the Conquest: For Sir *Edward Coke* tells us, that he himself hath read an Authentical Manuscript, intituled, *Autoritas Seneschalli Angliæ*; which putting an Example of his Authority, saith, *Sicut accidit Godwino, Comiti Kentiæ, tempore Regis Edwardi, Antecessoris Willielmi Ducis Normandiæ, pro hujusmodi male gestis, & consiliis suis, per Seneschallum Angliæ adjudicatus, & foris fecit Comitivam suam.* In the time of *William the Conqueror*, *William Fitz-Eustace* was Steward of England.

† Co. 4. Inst. 59.

Next come we to consider, how this Great Office was formerly holden, and how at his time,

This Magistracy was formerly of Inheritance, and belonged to the Earldom of *Leicester*, as appeareth by a Record produced by Sir *Edward Coke*; *Seneschalcia Angliæ pertinet ad Comitum de Leicester, & pertinuit ab antiquo.*

Other Records testify, that it belonged to the Barony of *Hinckley*; and my Lord *Coke* tells us, that in the Reign of *William Rufus*, and *H. I. Hugh Grantsemenel*, Baron of *Hinckley*, held that Barony by the said Office; so that there seems a Diversity between these Records; but we shall reconcile it thus: *Hinckley* was parcel of the Possessions of the E. of *Leicester*; for *Robert Bellamont*, E. of *Leicester*, in the Reign of *Henry II.* married with *Petronil*, Daughter and Heir of the said *Hugh Grantsemenel*, Baron of *Hinckley*, and Lord Steward of *England*; and so it continued, till by the Forfeiture of *Simon Montford* it came to
King

King *Henry III.* who in the fiftieth Year of his Reign created *Edmond* his second Son Earl of *Leicester*, Baron of *Hinckley*, and High-Steward of *England*; which continued in his Line, until *Henry of Bullingbrook*, Son and Heir of *John of Gaunt*, Duke of *Lancaster*, who was the last that had any Estate of Inheritance in the Office of the Steward of *England*.

Since the Time of *H. of Bullingbrook*, this great Office was never granted to any Subject, but only *hac Vice*: and the Reason was, for that the Power of this Officer is so transcendent, that it was not holden fit to be in any Subject's hands: For a Record saith, *Et sciendum est quod ejus Officium est supervidere & regnare sub Rege, & immediate post Regem totum Regnum Angliæ, & omnes Ministros Legum infra idem Regnum temporibus pacis & guerrarum, &c.* and proceedeth particularly with divers high Powers and Authorities.

It is a Place of that Transcendency and Heighth, that it might in some sort match
the

the ^ε*Ephori* among the *Lacedæmonians*: The Custom of our Commonwealth hath upon great Consideration and Policy brought it to pass, that this Officer is of no great Duration, but only for the Dispatch of some special Business, as the Arraignment of some Nobleman, in case of Treason, &c. which once ended, his Commission expireth: so that we may describe him thus; *Magistratus est excelsus, qui pro uno die a Rege ordinatur, cum aliquis ex Proceribus Regni in Judicium vocatur de noxa Capitali.*

Now we are to take a Prospect of the Extent of his Lordship's Jurisdiction and Power, and the Rules he ought to judge by.

Although the Power and Authority of the Lord High-Steward hath been since the Reign of King *Henry IV.* but *hac Vice*, yet is the *hac Vice* limited and appointed; as when a Lord of Parliament is indicted of Treason or Felony, then the Grant of this

^ε *Ephori*, ἐφόροι, *Magistratus quidam Lacedæmoniorum oppositi Regibus, qui inspiciebant ea quæ ad Rempub. pertinebant.*

Office

Office under the Great Seal of *England*, is to a Lord of Parliament, reciting the Indictment: *Nos considerantes quod Justitia est virtus Excellens, & Altissimo complacens, eaque præ omnibus uti volentes, ac pro eo quod Officium Seneschalli Angliæ, cujus præsentia pro administratione Justitiæ, & Executione ejusdem in hac parte faciend. Requiritur, ut accepimus jam valeat: de Fidelitate, Strenuitate, provida Circumspectione & Industria Vestris plurimum confidentes, Ordinavimus & Constituimus Vos ex hac causa & causis Seneschallum Nostrum Angliæ ad Officium illud cum omnibus eidem Officio in hac parte debitis & pertinentibus hac vice gerend. accipiend. & exercend. Dantes & concedentes vobis tenore præsentium plenam & sufficientem Potestatem & Auctoritatem ac Mandatum speciale Indictamentum prædictum, &c.* So that this Great Officer is wholly restrained to proceed only upon the recited Indictment.

At every Coronation he hath a Commission under the Great Seal^a, *hac Vice*, to hear and determine the Claims for Grand Serjeanties, and other Honourable Services,

^a *Coke's Litt.* 79. a. b. 4 *Inst.* 59.

to be done at the Coronation, for the solemnizing thereof; for which purpose he holds his Court some convenient Time before the Coronation.

The first Person that was created *hac Vice* for solemnizing the Coronation of Henry IV. was Thomas his second Son; and upon the Arraignment of Thomas Holland, Earl of Huntingdon: The first that was created Steward of England, *hac vice*, was Edward Earl of Devon.

Lastly, The Order and Manner of Arraigning a Peer of the Realm before this Great Officer is to be consider'd.

As the Peers of the Realm, who are Tryers, are not sworn; so the Lord High-Steward, being Judge, is not sworn likewise; yet ought he to proceed according to his Letters-Patents, *Secundum Legem & Consuetudinem Angliæ*; for all * Commis-sions and Charters for Execution of Justice, are *facturi quod ad Justitiam pertinet, secundum Legem & Consuetudinem Angliæ*.

* Co. Litt. 142. a. 4 Inst. f. 60.

But

But admit the Commission should be,
Secundum sanas Discretionis vestras: How
 then?

I answer, *Discretio est discernere per Legem quid sit Justum*; that is, to discern by the right Line of Law, and not the warped Measure of private Opinion: *Si a Jure discedas, vagus eris, & erunt omnia incerta*: 'Tis certain he that out-runs the Law, hastens to his own Destruction. Commissions then that Authorise proceeding *secundum sanas discretionis*, &c. in Sense are *secundum Legem*, &c.

The Earl of ^b *Huntingdon* was indicted of High-Treason in *London*, by a Commission before the Mayor and Justices; for that he, with other Persons, agreed to go a Mumming (which the *French* call *Masquerade*) on the Night of *Epiphany*, in which they intended to kill the King, then at *Windsor*: And after the King granted a Commission to the Earl of *Derby*, reciting, That whereas *George, E. of H.* was indicted of

^b 1 H. IV. f. 1. a.

C 2

High-

High-Treason, and that he would that Right should be done; and because the Office of the Steward of *England* is now void, he grants it to the said Earl of *Derby*, to do Justice to the said Earl of *Huntingdon*, commanding by the same Commission all the Lords to be attendant upon him; and Precept was likewise given by the same to the Constable of the *Tower*, to be attendant on him, and to bring the Prisoner (*viz.*) the E. of *H.* before the said E. of *D.* on the Day appointed: Whereupon the E. of *D.* the same Day sat in *Westminster-Hall* under a Cloth of Estate by himself, and the Earl of *Westmorland*, and other Earls and Barons, sat at a considerable Distance, and all the the Justices and Barons of the Exchequer sat round a Table, and after three *O Yes's* made, and the Commission read, the Justices deliver'd the Indictment to the Lord Steward, which was deliver'd to the Clerk of the Crown, who read it to the said E. of *H.* which he confessed; whereupon *Hill* the King's Serjeant pray'd Judgment, which the Lord Steward (after he had rehearsed the whole Matter) pronounced in this manner; That the E. of *H.* should be taken back
to

to the Tower of *London*, and from thence to be drawn to the Gallows, and there hanged; and being yet alive, cut down, and his Entrails drawn out of his Body, and burnt; and that he should be beheaded, and quartered, *Et sic Deus propitiatur Animæ suæ.*

The Justices then said, that if the E. of *H.* had deny'd the Treason, the Lord Steward should have demanded of every Lord in open Court, what they thought in their Consciences, beginning with the puisny Lord; and if the greater Number said Guilty, then the Judgment to be given as above.

I refer your Lordships to *Camden's Annals of Queen Elizabeth*, for the manner of the Tryal of *Thomas Howard*, Duke of *Norfolk*, before *George Talbot*, Earl of *Shrewsbury*, Lord High-Steward upon that occasion.

Sir *Edward Coke* describes the manner how a Peer is to be tried, in case of Treason,

son, &c. before the Lord High-Steward of England.

He must be indicted before Commissioners of *Oyer and Terminer*, or in the *King's-Bench*, if the Treason or Misprision, Felony, or Misprision of Felony, be committed in that County where the *King's-Bench* sit; when he is indicted, then the King, by his Commission under the Great Seal of *England*, constitutes some Peer of the Realm to be, *hac vice*, Steward of *England*, who is Judge in this case. The Commission recites the Judgment generally as 'tis found, and Power given to the Lord Steward to receive the Indictment, &c. and to proceed *secundum Legem et Consuetudinem Angliæ*. A Commandment is also given by the same to the Peers of the Realm to be attendant and obedient unto him; as also to the Lieutenant of the *Tower*, to bring the Prisoner before his Lordship.

Then a *Certiorari* is awarded out of *Chancery*, to remove the Indictment itself before the Lord Steward; which may either bear date the same Day of the Steward's Commission,

Commission, or any Day after. The Lord Steward directs his Precept under his Seal to the Commissioners, to certify the Indictment such a Day and Place. He also makes two other Precepts, one to the Constable or Lieutenant of the *Tower*, to bring the Body of the Prisoner before him, at such a Day and Place; as also to a Serjeant at Arms to summon, *Tot & tales Dominos, Magnates & Proceres hujus Regni Angliæ prædicti R. Comitibus E. Pares, per quos rei veritas melius sciri poterit, quod ipsi personaliter compareant coram prædict. Seneschallo apud Westm. tali die & hora ad faciend. ea quæ ex parte Domini Regis forent facienda, &c.*

In this Summons four Things are observable.

1. That all these Precepts, most commonly, bear date in one Day.

2. That no Number of Peers are named in the Precept, and yet there must be twelve or above.

3. That

3. That the Precept is awarded for the return of the Peers, before any Arraignment or Plea pleaded by the Prisoner.

4. That the Lords are not *de vicineto*; and therefore the Sitting and Tryal may be in any County of *England*.

At the Day, the Lord High-Steward, with six Serjeants at Arms before him, takes his Place under a Cloth of State; and then the Clerk of the Crown delivers to him his Commission, who re-delivers it. After three *O Yes's* by a Serjeant at Arms, and Commandment given in the Name of the Lord High-Steward of *England* to keep Silence, the Commission is read; then the Usher delivers to the Steward a white Rod, who re-delivers the same, which he holds before the Lord High-Steward. It was deliver'd, upon the like occasion, to the Earl of *Shrewsbury*, by *Garter King at Arms*.

O Yes being again made, Commandment is given in the Name of the High Steward to all Justices and Commissioners, to certify

fy all Indictments and Records ; which being deliver'd into Court, the Clerk of the Crown reads the Return, and the Serjeant at Arms is commanded to return his Precept, with the Names of the E. and Barons by him summoned, and the return of that is also read ; then are the Peers summoned to answer to their Names, which are recorded.

When they have taken their Places, and the Prisoner set to the Bar, then the Lord High-Steward declares unto them the Cause of their Assembly, and persuades the Prisoner to answer without Fear, assuring him, that he shall be heard with Patience, and that Justice shall be done to him.

After this, the Clerk of the Crown reads the Indictment, and proceeds to the Arraignment of the Prisoner ; and, if he plead *Not guilty*, the Entry is, *Et de hoc de bono & malo ponit se super Pares suos, &c.* After which the Lord High-Steward gives a Charge to the Peers, exhorting them to try the Prisoner indifferently, according to their Evidence, which is opened by the King's

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Learned

Learned Counfel, who produce their Proofs for the King againft the Prifoner. Some, or all of the Judges, are ever attendant upon the Lord High-Steward, and take their Places at the Feet of the Peers.

After the Evidence is given for the King, and the Prifoner's Defence made, he is withdrawn from the Bar, under the Custody of the Lieutenant, whilft the Tryers go to some Place to confider of their Evidence; upon debate of which, if they doubt of any matter, they cannot fend to the High-Steward to ask the Judges any Questions of Law, but in the Hearing of the Prifoner, that he may know whether the Cafe be rightly put, for *de facto jus oritur*; neither can they fend for the Judges to know their Opinion, but the High-Steward ought to demand it in Court, in the Prefence of the Prifoner.

When the Lords are agreed, they return into Court, and the Lord High-Steward publicly in open Court, beginning with the Puisny Lord, fays unto him, *My Lord A. is W. V. S. guilty of the Treafons whereof*
he

he hath been indicted and arraigned, or any of them? And the Lord standing up says, *Guilty, or Not Guilty;* and so upward of the rest *seriatim.*

The Peers having given their Verdict in the absence of the Prisoner, the Prisoner is brought to the Bar, whom the Lord High-Steward acquaints with the Verdict of his Peers, and gives Judgment accordingly, either of Condemnation, or Acquittal.

After the Service is performed, and *O Yes* made for dissolving the Commission, the white Rod is taken by the Lord High-Steward in both his Hands, and broken in Pieces.

Thus have I presented to your Lordships a Scheme of that solemn Order and Manner, how a Peer of the Realm is arraigned before the Lord High-Steward of *England.* I might amass several Precedents of like Nature, wherein the Axe of Death is born before the Prisoner, with the Edge from him; and after being found Guilty, with the Edge to him. I wish your Lordships may never

know more of this Point by a fatal Experience.

Now it remains that I give *Solutions* to those *Queries* your Lordships were pleased to put concerning Tryals, Treason, &c. by which I wish you may arrive at some reasonable Satisfaction.

QUERY I.

How Antient this Tryal by Peers may be?

S O L.

Without doubt 'tis coetaneous with the Office of the Lord High-Steward, and how old that is, hath been already shewn: However, I shall present one Authority, which proves, that Tryal by the Peerage was in use in the Reign of *William the Conqueror*, who, in the Beginning of his Reign, created *William Fitz Osborne* (Earl of *Betrevil* in *Normandy*) Earl of *Hereford*. His Son *Roger* succeeded him, and was Earl of *Hereford*, who, under Colour of his Sister's Marriage, near *New-Market* in *Cambridgeshire*,
where

where many of the Nobility were assembled, conspir'd with them to receive the *Danes* into *England*, and depose *William the Conqueror* (who was then in *Normandy*) from his Kingdom of *England*; to effect which, he with others rose. This Treason was reveal'd by *Walter*, Earl of *Huntingdon*, who was one of the Conspirators, and Son to the Great *Syward*, Earl of *Northumberland*; for which Treason, *Roger* Earl of *Hereford* was apprehended by *Urse Tiptof*, then Sheriff of *Worcestershire*, and after tryed by his Peers, and found guilty of the Treason, *per Judicium Parium suorum*. But he ended his Days in Prison.

QUERY II.

Whether a Peer can wave his Tryal by Peers?

S O L.

He cannot wave his Peers, and put himself upon the Tryal of Twelve Free-holders; for the Statute of *Mag. Chart.* is, that he

c. A. 8 W. I.

must

must be tryed by his Peers; and so it was resolved in the Lord *Dacre's* Case ^d.

QUERY III.

What Lords shall be tryed by Peers, in cases of Treason, &c?

S O L.

Every Lord of Parliament that hath Voice therein, and called thereto by the King's Writ, shall not be tryed by Peers; but only such as fit *Barones Nobilitatis*, as Dukes, Marquesses, Earls, Viscounts, and Barons; and not such as are Lords of Parliament, by reason of their Baronies, which they hold in right of the Church, as Archbishops, and Bishops of this Realm; for though they be Lords of Parliament, yet, upon an Impeachment either of Treason or Felony, they shall not be tryed by the Peers of the Realm, but by a Jury of Knights, and other substantial Persons upon their Oaths; and one Reason alledged by some (how truly let others judge) is, forasmuch as Archbishops and Bishops cannot pass in like Cases upon the Tryal of any other of the Peers, their

^d 26 H. VIII.

Lordships being prohibited by the Common and Ecclesiastical Laws to be Judges of Life and Death; and this Tryal ought to be mutual, since the Performance of it is upon their Honours, without any Oath taken.

And here, by the Way, your Lordships may take Notice, how great Regard the Law hath to the Word of a Peer, when spoken upon his Honour. I need say no more upon this *Topick*, since your Lordships in that Excellent Poem, *A PARADOX against Liberty*, have exprest your Thoughts so extremely well.

No Temporal Lord, but only Lords of Parliament, shall have this kind of Tryal; and therefore the eldest Son, and Heir Apparent of a Duke, in the Life of his Father, though he be called an Earl, is excluded: And this was the Case of *Henry Howard*, Earl of *Surrey*, Son and Heir Apparent of *Thomas Duke of Suffolk*, in the 38 of *H. VIII.* Likewise the Son and Heir Apparent of an Earl, though he be called Lord, or Baron; and all the younger Sons of Kings are Earls by Birth, though they have no
other

other Creation, yet shall they not be Partakers of this, or other Privileges, incident to the Lords of Parliament.

Those that are ^e Barons of *Ireland*, or *Scotland*, committing Treason, &c. in *England*, shall not have their Tryal by Peers, though they were born in *England*, for they receive their Dignity from a King of their Nations.

If a ^f Duke, or other Nobleman of *France*, *Spain*, &c. comes into *England* by the King's safe Conduct, in which the King styles him Duke, according to his Creation, nevertheless in all Proceedings in the King's Courts he shall not be styled by his Name of Dignity, much less be a partaker of the Privilege of this Tryal by Peers.

But if the King of *England* at this Day create one of his Subjects of *Scotland* to be Viscount within *England*, or by ordinary Summons under his Great Seal call him to the upper House of Parliament, and assign

^e *Cok. Litt.* 16. b. 3 *Inst. f.* 30. 2 *Inst. f.* 48.

^f *Co. L.* 7. *Calvin's Case.*

him

him a Place, and to Vote there in his Great Council, he shall be thereby a Peer of this Realm, and enjoy all their Privileges.

QUERY IV.

What Witnesses are required in Indictments and Tryals of Treason, or Misprision of Treason?

S O L.

By the ancient Common Law, one Witness or Accuser was not sufficient to convict any Person of High-Treason, for, in that Case, it was to be tryed before the Constable and Marshal by Combat; but they have no Jurisdiction to hold Plea of any thing which may be determined by Common Law: And that two Witnesses are requisite, appears by the Books of Law; and the ^e Common Law herein is grounded upon the Law of God, expressed both in the Old and New Testament, *Deut. xvii. §. 6. Numb. xxxv. §. 30. Deut. xix. §. 15.*

^e *Mirr. cap. 3. Ordin. de Attaint. Brad. L. 5. f. 354. 48 Ed. III. 30. 35 H. VI. 46, Fortescue c. 32.*

Matth. xviii. *ŷ.* 16. 2 *Cor.* xiii. *ŷ.* 1. and this seemeth more clear in the Tryal by Peers, because they come not *de aliquo Vicineto*, whereby they may take Notice of the Fact, in respect of Vicinity, as other Jurors may do. By the Statute of 1 *E. VI.* c. 12. none shall be indicted, arraigned, condemned, or convicted for any Treason, &c. for which the Offender shall suffer Pains of Death, Imprisonment, Loss or Forfeiture of his Goods, Chattels, Lands or Tenements, unless he be accused by two sufficient and lawful Witnesses, or shall willingly without violence confess the Fact. The same Provision is made by 5 *E. VI.* wherein I must observe to your Lordships, that two lawful Accusers, in this Act, are taken for two lawful Witnesses; for by two lawful Accusers, and accused by two lawful Witnesses (as 'tis in 1 *E. VI.*) are identical; which word (*Accusers*) was used, because two Witnesses ought directly to accuse, that is, charge the Prisoner, for the Common Law respects none else; and therefore lawful Accusers must be such as are allowed by Laws.

And

And thus 'twas resolved by the ^h Justices in Case of the Lord *Lumley*; for if they should not be taken according to the meaning aforesaid, then there must be two Accusers, by ⁱ 5 *E. VI.* and two Witneses, by ⁱ 1 *E. VI.* and the strange Concept in 2 *Mar.* that one may be an Accuser by Hear-say, was utterly denied in the Lord *Lumley's* Case.

And here, since your Lordships did not make it a *Query*, I shall not so strictly consider it, whether the Testimony of a Foreigner may be admitted, in case of Treason. The Duke of *Norfolk* at his Arraignment said, that nothing which was yet produced was of any moment against him, save only the Bishop of *Ross* his Testimony; and that (by Opinion of *Bracton*) was not to be admitted, because he was a Foreigner; to which *Callin*, Lord Chief Justice answer'd, that in such Causes as this, the Testimony of Foreigners is of force, and it lies in the ^k Peers

^h *Hill. 14 El.* ⁱ *Dyer f. 99. W. Thomas his Case.*
^k *Camd. El. A. 1572.*

to attribute to, or derogate from such Testimony as they shall think fit.

Where *Bracton* saith, that an Alien born cannot be a Witness, it is to be understood of an Alien Infidel; for the Bishop of *Ross* being a *Scot* born, was admitted to be a Witness, and sworn 14 *El.* by Opinion of all the Justices Assistants.

If a Person be accused by one Witness touching one Fact, and by another concerning another Fact, the one committed in *Middlesex*, the other in *Surrey*, he that swears the Fact done in *London*, joyned to the other Witness that swears to the Fact done in *Surrey*, shall be esteemed two sufficient Witnesses, in case of Treason; and so was it ruled by the Judges at the *Old-Baily*, upon the Tryal of the five Jesuits (*Whitebread, Harcourt, Turner, Fenwick, and Gaven*) according to the Resolution in Sir *H. Vane's* Case, at the King's-Bench Bar, where one Witness proved the levying War in one County, and the other proved the levying War in another County; and
so

so though they were but single Witnesses of single Facts, yet both coming up to the Indictment, they were adjudged two sufficient Witnesses to maintain it.

QUERY V.

Whether a Nobleman being arraigned, can challenge his Peers?

S O L.

If the Party arraigned (says Coke) be a Lord of Parliament, and a Peer of the Realm, and is to be tryed by his Peers, he shall not challenge any of them, for they are not sworn as other Jurors be, but find the Party guilty, or not guilty, upon their Faith or Allegiance to the King¹; and they are Judges of the Fact, and every of them doth separately give his judgment, beginning at the lowest.

Again, he tells us, that the four Knights^m, Electors of the Grand Assize, are not to be

¹ *Coke's Litt.* 156. b.

^m *Coke's Litt.* 294. a.

challenged;

challenged, for that in Law they be Judges to that purpose, and Judges cannot be challenged; and that's the Reason why Noblemen cannot be challenged, for *Magna Charta* saith, ⁿ *Per Judicium Parium suorum*, and not *Veredictum*.

When the Peers (that were to be Tryers at the Arraignment of the Earls of *Essex* and *Southampton*) were called by Name, the Earl of *Essex* ^o demanded whether it were not lawful for them (as the Use is to private Men) to except against some of their Peers? The Judges answer'd, That such was the Credit and Estimation of the Peers of *England*, that they are neither compelled to an Oath in Arraignments, nor subjected to Exceptions.

QUERY IV.

Whether the Lord High-Steward can collect the Evidence against the Prisoner, or confer with the Lords, touching the same, in the Prisoner's Absence?

ⁿ Cap. 29.

^o Camd. Eliz. A. 1601.

S O L.

To this I answer negatively, for after the King's Learned Counsel have produced all their Evidence, the Prisoner ought to be present at all Conferences touching the same; and therefore it shall be necessary for all Prisoners, after Evidence given against them, before departure from the Bar, to require Justice of the *Lord High-Steward*, and of the other Lords; and that no Question be demanded, or Conference had by any with the Lords, but in open Court in their own hearing, otherwise such Prisoners shall take no Advantage thereof after Verdict and Judgment given.

QUERY VII.

If the Lords be equally divided, between guilty and not guilty, whether the Party tryed shall be acquitted or condemned?

S O L.

In an Information in the Court of *Star-Chamber*, by the Attorney against Sir Stephen
Proctor,

Proctor, and others, for conspiracy against, and scandal of the Earl of ^p *Northampton*, and *Edward Lord Wotten*, two of his Majesty's most Honourable Privy Council; at the hearing of which Cause there sat eight in Court, whereof four condemned the Defendants, and the other four (*viz.*) the Lord Chancellor, two Bishops, and the Chancellor of the Exchequer, acquitted them; the Question was, according as your Lordships have proposed it, Whether the Defendants should be condemned or not: And here it was moved by the King's Learned Counsel, that when the Voices are equal, in that Case of which part the Lord Chancellor was, on that side it should be determin'd, without regard either to Plaintiff or Defendant: And it was resolved, that regularly and *de communi Jure*, in respect of the Equality of Voices, no Sentence could be given as it holdeth in the High Court of Parliament, and all other Courts, according to the old Rule, *Paribus sententiis Reus absolvitur*: And Sentence was never given against Sir *Stephen Proctor*, agreeable

to the general Rule in other Courts. In this Point the Civil Law concurs with the Common. *Inter Pares Numero Judices si dissonæ sententiæ proferantur, in liberalibus quidem causis (secundum quod a Divo Pio constitutum est) pro libertate statutum obtinet, in aliis autem causis pro Reo, quod & in Judiciis publicis, obtinere oportet^a.*

Reus sententiis paribus absolvitur, & semper quicquid dubium est, humanitas inclinat in melius.

Alter Judex damnat, alter absolvit, & inter dispares sententias melior vincat.

I shall here take Leave to make a little digression from the Query, and consider if a Person that is forth-coming, can by Parliament be attainted of High-Treason, and never called to answer? This seems as much worth the Inquiry, as other your Lordships Queries; and though omitted by you, I shall not let it pass without some Notice.

^a *Vid. Grot. lib. 2. c. 5. §. 18. de Jure Belli, &c.*

By the 2 of *H. VI.* we find a great Peer condemned without Arraignment or Answer; the like in 32 *H. 8.* one attainted (though living and forth-coming) of High-Treason, without ever being called to Judgment: The Legality whereof was scrupled, and demanded of the Judges whether the Act were void or not: With some pause, they adjudged it perilous, and of bad Example to the Inferior Courts; but 'twas agreed, if condemned by Parliãment, to be indisputable, though *Cap. 29. 5 E. III. c. 9. 28 E. III. c. 5.* of *Mag. Char.* affirms, that no Man ought to be condemned without Answer, without a *Quid fecisti?* and all due Proceedings at Law. *Qui statuit aliquid parte inaudita altera, licet æquum statuerit, haud æquus fuerit*.*

With the Municipal Laws agree those of the *Romans*.

* *Divi Severi & Antonini Magni rescriptum est, ne quis absens judicetur; & hoc*

* *Co. 4. Inst. f. 37, 38.*
48. 17.

* *Senec. in Loco.*

* *D.*

jure utimur, ne absentes damnentur; neque enim inaudita causa quemquam damnari æquitatis ratio patitur^u. It is not the Manner of the *Romans* to deliver any Man to Death, before the accused have his Accusers Face to Face, and License to answer for himself.

QUERY VIII.

Whether the King, and one of the Houses alone, or both without the King, can declare a Treason within the Statute of 25 E. III. cap. 2?

S O L.

John Duke of Groyen and Lancaster, Steward of England, and Thomas Duke of Glocester, Constable of England, the King's Uncles, complained to the King, that Thomas Talbot Knight, with others his Adherents, conspired the Death of the said Dukes, as the same was confessed, and well known, and prayed that the Parliament might judge

^u *Acts* xxv. v. 16.

of the Fault, (which Petition was just, and according to the Branch of the Statute of 25 E. III.) but the Record saith further, that the King and Lords in Parliament adjudged the same Fact to be High-Treason, which Judgment wanting the Assent of the Commons, was no Declaration within the said Statute which is attended with this Restriction :

That if any other Case, supposed to be Treason, should happen before any Justices, the Justices should tarry without going to Judgment of the Treason, till the Case be shewed before the King, and his Parliament (consisting of Lords Spiritual and Temporal, and the Commons) whether it ought to be adjudged Treason or Felony.

QUERY IX.

Whether the Subjects of another Prince, Confederate with the King of England, can be held for the King's Enemies?

S O L.

S O L.

It was objected against the Duke of *Norfolk*, concerning his relieving of the *Scots*, the Queen's Enemies, which was proved by Letters, and *Banister's* Confession, &c. whereupon the Duke asked the Judges, ^{*}*Whether the Subjects of another Prince, Confederate with the Queen of England, were to be holden for the Queen's Enemies?* *Calelin* Chief Justice answer'd, that they were; and that the Queen of *England* might make War with any Duke of *France*, and yet in the Interim keep Peace with the *French* King. And here 'tis to be noted, that the Judges ought not to deliver their Opinions before-hand, in any criminal Case that may come before them judicially. In the Case of *Humphrey Stafford*, that Arch-Traytor, *Hussey*, Chief Justice, besought King *H. VII.* that he would not desire to know their Opinions before-hand for him, for they thought it should come before them in the *King's-Bench* judicially, and then they would do that which of right they

^{*} *Camb. Eliz. A. 1572.*

ought, which the King approved of. Besides the Nature of their Oath requires it, who are sworn that they shall well and lawfully serve our Sovereign Lord the King, and his People, in the Office of a *Justice*; and that they shall do equal Law and Execution of Right to all his Subjects.

QUERY X.

Whether an Attainder of Treason may be falsified by the Plea of the Party?

S O L.

A. 1 Mar. a Commission of Oyer and Terminer in London was directed to Sir Thomas White, Lord Mayor, and to divers others, reciting, that where Sir Robert Dudley Knight, 9 Jan. 1 Mar. was indicted of High-Treason before Thomas Duke of Norfolk, and fourteen other Commissioners in the County of Norfolk, (where in truth the Commission was directed to so many, but the Indictment was taken before Eight of them only) granting to them, or any four of them, Authority to receive the Indictment

dictment taken before fifteen Commissioners, and to proceed thereupon as special Justices of *Oyer* and *Terminer*; by pretext whereof they proceeded, and upon Confession of the said Sir *Robert Dudley*, gave Judgment against him.

In this Case it was adjudged, that Sir *Robert Dudley*, then Earl of *Leicester*, might falsify the said Attainder by Plea, because it was void, and *coram non Judice*; for that the latter Commissioners had not power to proceed upon an Indictment taken before Eight, but before Fifteen, and so void. The Party is not driven to his Writ of Error, but may falsify the Attainder by Plea, shewing the special Matter, which proveth it void *ut supra*. In which Case the Party forfeiteth neither Lands nor Goods.

'Tis holden by some, that if a Person be attainted of High-Treason by the Common Law, that no Writ of Error should be brought for the Reversal of that Attainder, by reason of these Words in the Statute 33 *H. VIII, cap. 20*. And if any Person or
Persons

Persons shall be attainted of High-Treason by the Course of the Common Law, &c. *that every such Attainder by the Common Law, shall be of as good Strength, Value, Force and Effect, as if it had been done by Authority of Parliament.* But the Contrary hereof was resolved at a Parliament holden *A. 25 Eliz.* that a Writ of Error should be maintained for the Reversal of erroneous Attainders of High-Treason by the Common Law; for that former Statute is to be intended of lawful Attainders, and not where there is any Error in the same: for by that of the Queen 'tis provided, *That no Record of Attainder of any Person or Persons, of or for any High-Treason, where the Party so Attainted is or hath been executed for the same, shall be, &c. in any wise hereafter reversed, undone, avoided, or impeached by any Plea, or for any Error whatsoever.*

QUERY XI.

Whether Torture, in case of Treason or Felony, may be used by our Law?

S O L.

Sir *John Fortescue*, Chief Justice of *England*, who wrote in Commendation of our Common Laws, preferreth the same for Government before the Civil Law; and particularly, that all Tortures were against the Common Law expressly; and he proceeds to shew the Inconveniencies and Mischiefs thereof, by fearful Examples; to which Learned Author I refer your Lordships^a.

It is against *Mag. Charta*^b, which says, *Nullus liber homo capiatur, vel Imprisonetur, &c. aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus nisi per legale Judicium Parium suorum vel per Legem Terræ*. And accordingly all the Ancient Authors are against the inflicting Pains and Tortures upon Prisoners, before or after Attainder, but such as answer the Judgment^c.

John Holland, Earl of *Huntingdon*, was by King *H. VI.* created Duke of *Exeter*, and *A. 26 H. VI.* the King granted to him

^a Cap. 22. ^b Cap. 29. ^c Co. 3. Inst. f. 35.

the Office of the Constableship of the *Tower* of *London*. He and *William de la Poole*, Duke of *Suffolk*, with some others, intended to have brought in the Civil Laws; and, for a Beginning of the same, the Duke of *Exeter* first brought into the *Tower* the Rack, or Brake, allowed in many Cases by the Civil Law; and for that Reason it was called the Duke of *Exeter's* Daughter.

QUERY XII.

Whether the King, under the Great Seal, may command all Proceſs in Criminal Cauſes to ceaſe?

S O L.

We find (ſays *Coke*) a Diſcharge of further Proceeding, directed to the *Judges* of the Court, &c. (not by way of pardoning the Offence) but by the King's Acknowledgment, under the Great Seal, of the Party's Innocence, with Commandment to the *Judges*, that in the former Proceedings, they ſhall altogether ſurceaſe; whereupon the Court will award, that the Party ſhall go *ſine Die*, and that there ſhall be no further

ther Proceedings against him. *William de Melton*, Archbishop of *York*, was accused in the *King's-Bench*, *coram Rege & Concilio suo in Anno 3 Ed. III.* for Adherency to *Edmond* Earl of *Kent* in his Treasons; whereunto the Archbishop pleaded *Not Guilty*; and, after two Writs of *Venire Facias* awarded, the King directed his Writ under the Great Seal to the Judges of the *King's-Bench*, to this Effect.

Licet Venerabilis Pater Willielmus Archiepiscopus Ebor. Stephanus London Episcopus per Diversa Brevia Nostra coram Nobis ad sectam Nostram Implacitentur de eo, quod ipsi Edmundo Comiti Cantiae adhæsisse debuerant, quia tamen prædict. Archiepiscopus & Episcopus de adhæsiōe prædicta omnino immunes reputamus, Vobis mandamus quod Placitis prædictis coram Nobis ulterius tenend. omnino supersedeatis, Teste meipso, &c. The Award of the Court hereupon is very observable: *Viz. Cujus Brevis prætextu, consideratum est, quod prædictus Archiepiscopus eat inde sine die, &c. & ulterius non procedatur versus eum.*

Stephen Gravesend, Bishop of *London*^d, was charged with the same Offence in Parliament, *A. 3 E. III.* whence, by Order of Parliament, he was referred to the *King's-Bench* to be tried, where he pleaded *Not Guilty*, and after was discharged, as the Archbishop. It may be thought, that accepting the Pardon, might be an Implication of their Fault, and therefore it ran in a new strain; but no Man that is well advised, says the great Oracle of the Law, will refuse God's or the King's Pardon; for in the *King's Displeasure there is Death*, says the Holy Writ; and who knows how often he offends, and consequently stands Need of it? But how far this Branch of the Prerogative may be extended, and what Qualifications it may admit, belongs not to a private Man to determine.

QUERY XIII.

Whether a Person can be Attainted of High Treason by general Words?

^d *Pasch. 4 E. 3. Rol. 5. 3.*

S O L.

Where by due Course of Law a Man cannot be Attainted of High Treason, unless the Law fore-judge the Offence such, he ought not to be Attainted by general Words, by Authority of Parliament, (as sometime hath been used) but the Treason ought to be specially expressed, seeing that the Court of Parliament is the Highest and most Honourable Court of Justice, and ought to give Example to the Inferior; *Magis exemplis quam præceptis ducimur.*

QUERY XIV.

Whether a Subject of one Kingdom guilty of Treason, flying into another Kingdom, ought to be remitted to his own Sovereign?

S O L.

It is holden, and so it hath been resolved, that divided Kingdoms, under several Kings in League one with another, are Sanctuaries for Servants or Subjects flying for Safety;

and upon Demand, are not by the Laws and Liberties of Kingdoms to be delivered: And this Opinion seems grounded upon the Law in *Deut. c. xxiii. v. 15. Thou shalt not deliver unto his Master the Servant which is escaped from his Master unto thee.*

When the Lord *Paget* and *Arundel* came into *France*, Sir *Edward Stafford*, Queen *Eliz.*^e Ambassador there, diligently observed them, yet could by no Means discover what they attempted; he desired nevertheless of the *French King*, that they, with *Morgan*, and other *English*, who were practising against their Prince and Country, might be removed out of *France*: To which he received this Answer, *That if they attempted any thing in France, the King would punish them according to Law, That all Kingdoms were free for Fugitives; and that it was the great Concernment of Kings to maintain every one the Privileges of his own Kingdom: That Queen Eliz. had not long since received into her Kingdom Montgomery, the Prince of Conde, and others*

^e *Camb. El. 1584.*

of the French Nation; and that Sagury, the King of Navarre's Embassadour, was in England at this very Time, practising to move new Troubles against the French King.

King *H. VIII.* in the 28th Year of his Reign, being in League with the *French* King, and in Enmity with the Pope, who was in League likewise with *France*, and had seen Cardinal *Poole* Embassador to the *French* King, of whom King *H. VIII.* demanded the said Cardinal, being his Subject, and Attainted of Treason; and to that End caused a Treatise to be publish'd, that it ought to be done *Jure Gentium, sed non prævaluit.*

Ferdinando, King of *Spain*, upon Request made by *H. VII.* to have *Edmond de la Poole*, Earl of *Suffolk*, Attainted of High Treason by Parliament, *Anno 19 H. VII.* at first intending to observe the Privilege and Liberty of Kings, in protecting such as came to him for Succour and Protection, delivered him not; yet in the End, upon
the

the earnest Request of the King, and his Promise not to put him to death, he caused the said Earl to be delivered up to the King, who kept him in Prison, and construing his Promise to be but personal, commanded his Son *Henry*, after his Death to execute him; which he caused to be done in the fifth Year of his Reign.

I shall add one more Example of a Remission out of *Zouch*^t. *Cum quidam Stywardus Scotus, qui Mariam Scotorum Reginam veneno tollere conatus est, in Anglia deprehenderet, Ed. sextus Rex Angliæ eum in manus Regis Galliæ tradidit, ut debito supplicio remitteretur, quod nonnullis displicuit, quia etsi ratio suadeat, ut qui in patria deliquit, in patria puniatur, aliter tamen de consuetudine, quoad remissionem, usurpatum est.*

Thus having given your Lordships a Description of the Lord High Steward's Office, and the Manner how a Peer is to be

^t *Traët. de Judicio inter Gentes.*

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Arraigned before him, with such Solutions
to your several Queries, as I have collected
out of the Books of Law and History I
conclude myself, My Lords,

Your Lordships,

in all Justice,

From my Chambers
in the *Temple*, Jan.
17, 1680.

E D. S.

F I N I S.



[40]

Arranged before him, with such Solutions
to your several Queries, as I have collected
out of the Books of Law and History I
conclude myself, My Lords,



From Mr. C.
in the Year
1710.

W I N I S

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